On
Notice of Proposed Rulemaking:
Reporting of Information About
Foreign Safety Recalls and Campaigns
Related to Potential Defects

National Highway Traffic Safety Administration
U.S. Department of Transportation

Docket No. NHTSA 2001-10773; Notice 1

December 10, 2001

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INTRODUCTION

The Rubber Manufacturers Association ("RMA") is the primary trade association representing the interests of the tire and rubber industry in the United States. RMA's membership includes all of the country's major tire manufacturers: Bridgestone/Firestone, Inc., Continental Tire N.A., Cooper Tire & Rubber Company, Goodyear Tire & Rubber Company, Michelin North America, Inc., Pirelli Tire North America, and Yokohama Tire Corporation.

On behalf of its tire manufacturer members, RMA responds to the National Highway Traffic Safety Administration's ("NHTSA" or "Agency") Notice of Proposed Rulemaking ("NPRM") on "Reporting of Information About Foreign Safety Recalls and Campaigns Related to Potential Defects," Docket No. 2001-10773; Notice 1; published in the *Federal Register* on October 11, 2001.

With the enactment of Section 3 of the TREAD Act, Congress granted NHTSA new authority to collect information to assist the Agency in the early identification of potential safety related issues in motor vehicles and motor vehicle equipment manufactured, sold or imported into the U.S. Recognizing that there are different categories of information that could be helpful to NHTSA, Congress divided Section 3 into 3 subsections. Subsection (a) deals with information related to foreign safety recalls or other safety related claims. Subsection (b) addresses "early warning" information such as warranty data, claims and other information that may serve to provide an early

indication of a potential safety issue. Subsection (c) required manufacturers to report the sale or lease of defective or noncompliant tires to assist in preventing crashes caused by such tires.

Each one of these subsections was intended to address the specific type of information outlined by that subsection. Each of the subsections also represented varying levels of burden associated with reporting. For example, subsection (a) was considered to be relatively straightforward. Manufacturers are required to report to NHTSA any safety related recalls or other safety campaigns in foreign countries that involve vehicles or equipment identical or substantially similar to vehicles or equipment in the United States. Because this provision is so straightforward, it was considered self-implementing and effective immediately upon enactment of the Act. As set forth in section 3(a), the only issue necessary for rulemaking is the specific contents of the notification. By contrast, subsection (b) concerning early warning reporting, was considered more complex insomuch as this subsection covered a wide range of varying information. Hence, a more detailed rulemaking was required to define and implement this section. Keeping in mind the difference between the kinds of information sought by the foreign recall reporting and early warning reporting subsections, RMA now turns to addressing the specific issues raised by NHTSA's NPRM on foreign recall reporting.

In this NPRM, NHTSA proposes a system of information collection and reporting relating to foreign safety recalls and foreign safety campaigns, as required under Section 3(a) of the TREAD Act. As proponents of this self-implementing provision, RMA's members have been in compliance with the reporting requirements of section 3(a) since the TREAD Act was signed into law on November 1, 2000. The only role for NHTSA under this provision is to "prescribe the contents of the notification required by this subsection relating to foreign safety recall and safety campaign reporting". As NHTSA has recognized in the docket, the Agency is soliciting comments to ensure that the final "contents of the notification" and related reporting mechanisms approved in this proceeding reflect the procedures currently in use by the tire manufacturers covered under the TREAD Act. Several aspects of the NPRM must be refined to clearly reflect Congressional intent as outlined above.

THE DEFINITION OF MANUFACTURER SHOULD BE RETAINED FROM THE MOTOR VEHICLE SAFETY ACT

RMA believes that the Agency should retain the existing definition of "manufacturer" in the National Traffic and Motor Vehicle Safety Act of 1966 ("Safety Act") for purposes of this rulemaking. Congress clearly did not intend to amend the definition of manufacturer in the Safety Act. The Safety Act broadly defines a "manufacturer" as "a person who (A) manufacturers or assembles motor vehicle equipment; or (B) imports motor vehicle equipment." *See* 49 U.S.C. § 30102(a)(5). Any entity that produces tires in the United States or imports tires into the United States is therefore a " manufacturer" under the Safety Act.

As RMA has explained in comments submitted in the early warning reporting rulemaking, U.S. consumers also purchase tires through large retailers, such as Sears, Wal-Mart, and other large distributors under private label brands. As NHTSA recognizes, even though the tires are built by another company, these tire brand name owners are considered "manufacturers" under 49 U.S.C. § 30102 (b)(1)(E). Tire brand name owners thus have the same defect and noncompliance reporting requirements as tire manufacturers under 49 C.F.R. § 573.3 (d). There may be instances of a brand name owner exporting certain tires without the original tire manufacturer's knowledge. RMA has urged NHTSA to allow the tire manufacturer and the private label brand name owners to decide which of them should report the required early warning information. Similarly, RMA believes that NHTSA should also allow the private brand name owners and the tire manufacturers to decide which party is responsible for reporting foreign recalls and safety campaigns.

With respect to other issues associated with the definition of "manufacturer" RMA is concerned with NHTSA's proposed expansion of the Safety Act's definition of manufacturer to include an "affiliate or agent of a manufacturer." Neither "agent" nor "affiliate" is defined in the NPRM. (*See* proposed 49 C.F.R. §579.11, at 66 *Fed. Reg.* 51917). "Agents" and "affiliates" could possibly be interpreted to include tire dealers, salesmen, accountants, and others who have absolutely no authority to take safety-related actions and are outside the tire manufacturer's span of control with respect to the type of information that must be reported under Section 3(a) of the TREAD Act. As stated above, RMA's tire manufacturer members have already implemented procedures designed to ensure that determinations of foreign safety recalls or other safety campaigns – whether made by the manufacturer or by a foreign government – are promptly reported to NHTSA within the statutorily required "5 working days." The Safety Act's definition of manufacturer is sufficiently broad to ensure compliance with the letter and spirit of the TREAD Act, as well as the Agency's expanded mandate to collect information related to foreign safety recalls and other safety campaigns. There is simply no language in the TREAD Act or its legislative history that would support NHTSA's interpretation that the reporting obligation would extend to a manufacturer's agents or affiliates. RMA recommends that the Agency delete the terms "agents and affiliates" from proposed 49 C.F.R. §579.11.

If NHTSA feels compelled to include the term "affiliate" in the regulation, RMA believes the Agency must accurately and specifically define the term. RMA recommends the following definition of affiliate: "*affiliates are any two entities a majority of the beneficial ownership of which rests in the same ultimate entity, or where one of the entities has a majority of the beneficial ownership of the other.*"

THE CRITERIA FOR SAFETY RECALL OR OTHER SAFETY CAMPAIGN SHOULD BE CLEARLY OUTLINED

The TREAD Act requires the reporting of information related to a determination by a foreign government or a manufacturer to conduct a safety recall or other safety campaign in a foreign country. NHTSA has attempted to expand this requirement by defining "other safety campaign" as "an action in which a manufacturer . . . communicates with owners and /or dealers in a foreign country with respect to conditions under which vehicles or equipment should be operated, repaired, or replaced, that relate to safety." [*See* proposed 49 C.F.R. §579.11, 66 *Fed. Reg*. at 51917 (emph. added).]

RMA believes that this definition goes beyond the express language and intent of the TREAD Act and would impose substantial reporting burdens on tire manufacturers without providing the Agency with additional, relevant information related to tire safety. For example, in order to comply with this proposed mandate, any communication regarding routine operational or maintenance issues would have to be reported to NHTSA. RMA does not believe that NHTSA should require manufacturers to report such information on foreign tires when the Agency has indicated it does not intend to require the reporting of the same information for domestic tires. If NHTSA arbitrarily expands the definition in this fashion, tire manufacturers will have to report wide swathes of information that will not further, but frustrate, the goal of providing the Agency with timely, relevant and verifiable information related to foreign safety campaigns.

Accordingly RMA urges NHTSA to adopt the following definition of "other safety campaign" (proposed 49 C.F.R. §579.11):

> *Other safety campaign means an action in which a manufacturer, including but not limited to a foreign subsidiary of a manufacturer, communicates with owners and/or dealers in a foreign country with respect to conditions under which* ***specific models of vehicles*** *or* ***specific brands or models of equipment should be operated, repaired, or replaced, that relate to safety. This definition does not include customer satisfaction, general maintenance, operating or safety information applicable to a broad range of vehicles or equipment and is not directed toward a particular identified safety issue or safety defect in such vehicles or equipment.***

Secondly, NHTSA has not provided a definition of what constitutes a "determination of a foreign government." Since there are only three[1] other countries with safety recall laws similar to the United States, most of the information reported under Section 3(a) will constitute information derived from a safety campaign. However, NHTSA has given no specific guidance on what constitutes a determination by a foreign government and what effect, if any, statements by agencies of foreign governments with

[1] Only the United States, Canada, the United Kingdom, and Australia have statutes authorizing the federal (or national) government to recall motor vehicles or motor vehicle equipment in use in those countries.

no specific safety authority would have on the reporting requirement. Since so little guidance exists, RMA urges NHTSA to establish two specific criteria in defining a determination by a foreign government: (1) the determination should be limited to a final determination and (2) the determination would be considered a safety-related defect under U.S. law.

Finally, RMA objects to including political subdivisions in the foreign reporting requirements. States are preempted from taking such an action in the United States and RMA believes this proposal should be deleted because it (1) is not required under the TREAD Act and (2) will be impractical or impossible for manufacturers to comply. This issue is particularly problematic since the Agency has proposed no limiting definition of "political subdivision." *See* proposed 49 C.F.R. §579.13 (b), 66 *Fed. Reg.* at 51918.)

The TREAD Act and its legislative history do not provide any authority for requiring manufacturers to report determinations from foreign "political subdivisions." Indeed, the House Commerce Committee Report accompanying the House-passed version of the TREAD Act clearly limits the reporting obligation only when there is an "official" determination made by a "foreign government" to conduct a safety recall or campaign "within the country," not within a political subdivision:

> If a foreign government has officially made a determination that a safety recall or other safety campaign must be conducted within the country on a motor vehicle or motor vehicle equipment, then the manufacturer must notify NHTSA within five working days, where the manufacturer sells identical or similar vehicles or equipment in the United States. The Secretary is given regulatory authority to prescribe what information the manufacturer must provide in notifying NHTSA of the safety recall or campaign.

H.R. Rep. No. 106-954, at 13 (Oct. 10, 2000) (emph. added).

It will be at best impractical, if not impossible, for manufacturers to obtain information from "political subdivisions" of a foreign government – let alone report it to NHTSA within the 5-day reporting period. Such information is not well organized or published in any regular fashion and therefore difficult to track, especially if it does not constitute an "official" determination ratified by the central government of the foreign country. Indeed, RMA is unaware of any other statute or regulation that requires the reporting of actions of foreign political subdivisions to the U.S. government. Accordingly, NHTSA should not include political subdivisions in the definition of foreign government in proposed 49 C.F.R. §579.13(b) unless the political subdivision has been given specific authority to make such a determination.

THE DEFINITION OF "SUBSTANTIALLY SIMILAR TIRE" SHOULD BE AMENDED

It is RMA's understanding that NHTSA does not intend to use the same definition of "substantially similar" for purposes of both the foreign recall and early warning regulations in new 49 C.F.R. Part 579. To avoid confusion, RMA believes the term should have the same definition for both the foreign recall subpart and early warning reporting subpart of Part 579.

In response to the early warning reporting ANPR, RMA urged the Agency to define "substantially similar tires" as *"tires that have the same size, speed rating, load index, and construction, irrespective of plant of manufacture or tire line name."* As the Agency is aware, the proposed definition of "substantially similar tires" for purposes of the foreign reporting requirements is different. Under proposed 49 C.F.R. §579.12(c), *"Tires sold or in use outside the United States are substantially similar to tires sold or offered for sale in the United States if they have same model name and size designation, or if they are identical except for the model name."* Thus, under NHTSA's proposed definition, a tire sold in a foreign country is substantially similar to a tire sold in the U.S. if both tires have the same "model name and size designation".

RMA is concerned that this definition may cause confusion. Tires with the same "model name" may have vastly differing construction or other technical specifications and would not be substantially similar. It is also difficult to come up with a consistently applicable definition of "model" name. What some consumers assume to be a "model" name is merely a popular "family" name and the tire lines within the "family" bear few similarities. Tire manufacturers use names for marketing purposes and a tire name does not necessarily imply any specifics about tire construction. "Family names" will often have suffixes associated with them denoting all terrain use, highway use, on/off highway use, off highway use, minivan and small SUV applications, and high performance tires. The same tire "family name" can be associated with each of these tires but the suffix is needed to clearly identify a "model" or "tire line". This is especially true if from a marketing perspective the name has proven popular. Therefore, the "family name" (Wrangler, Wilderness, Steeltex, Dueler, Scorpion, P-Zero to name a few) alone is incomplete as a "model name". The designations after the "family name" (A/T, A/S, GT, RT, RV, HS, Treker, etc.) refer to the specific tire models or specific tire lines. Without the important suffix information the "family name" by itself is incomplete and potentially inaccurate for purposes of making comparisons with other tires.

Moreover, a manufacturer may have hundreds of "model names" in use at any one time; over the course of a year, for instance, the collection of model names in use by any one manufacturer can change numerous times as model names are retired and introduced in response to marketing conditions and product innovations. RMA is not, however, opposed to the use of "model name" for the purposes of this rulemaking if the Agency allows each tire manufacturer to define "model name" according to the company's marketing practices and technical requirements.

THE ADDITIONAL REPORTING REQUIREMENTS FOR FOREIGN SAFETY CAMPAIGNS SHOULD BE ELIMINATED

As discussed above, the industry believes that the Agency should adopt RMA's proposed definition of "safety campaign" in order to ensure that its meaning is clear for purposes of triggering the TREAD Act's foreign reporting obligations. Then NHTSA can consider the important issue of what information must be reported.

In prescribing the contents of the reports required under Section 3(a) of the TREAD Act, NHTSA proposes that the information currently required for the reporting of domestic recalls (*see* 49 C.F.R. §573.5(c)(1)-(7)) also be required for the reporting of both foreign recalls and foreign safety campaigns. *See* proposed 49 C.F.R. §579.14(a) at 66 *Fed. Reg.* 51918. While RMA does not object to providing such detailed and extensive information for foreign *recalls*, NHTSA has not provided a sufficient basis for requiring this information for foreign *safety campaigns*. As even NHTSA recognizes:

> [T]his is more information than is currently required in connection with campaigns in the United States that do not constitute safety recalls; under 49 CFR 573.8, manufacturers must merely submit the documents that they send to owners and dealers, regarding vehicle and equipment malfunctions, and they need not provide all the information set out in 49 CFR 573.5(c).

66 *Fed. Reg*. at 51914-15.

NHTSA should not require U.S. manufacturers to provide more information for foreign safety campaigns than it currently requires for domestic safety campaigns. It proposes to do so, in part, "because of the difficulty in distinguishing between 'safety recalls' and 'other safety campaigns' in foreign countries." 66 Fed. Reg. at 51915. But this explanation ignores the fact that, under the TREAD Act, it is the manufacturer who makes the determination to conduct a safety recall or campaign, which then triggers the reporting obligation. NHTSA has been given no statutory authority to make or second-guess this determination. Congress simply gave the Agency the authority "to prescribe what information the manufacturer must provide in notifying NHTSA of the safety recall or campaign." H.R. Rep. No. 106-954, at 13 (Oct. 10, 2000).

In attempting to impose the same reporting burden for foreign recalls and foreign campaigns, the Agency also ignores the public policy underlying its own regulations. The rationale for requiring different levels of information for U.S. recalls and safety campaigns is sound. It should also apply when U.S. manufacturers conduct such activities overseas.

Thus, RMA urges NHTSA to modify proposed 49 C.F.R. §579.14(a) to provide that "reports of safety campaigns made pursuant to §579.13 shall only include the information specified in §573.8 of this chapter."

DISCLOSURE OF CONFIDENTIAL INFORMATION

We note that it has been NHTSA's past practice to treat information as confidential upon request of the manufacturer, and we urge the Agency to continue that practice with respect to information reported under this provision.

CONCLUSION

For all of the reasons discussed herein, NHTSA should adopt the amendments recommended by RMA to the proposed foreign safety-related reporting regulations mandated by the TREAD Act.

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Questions concerning these comments should be directed to Ann Wilson, RMA Senior Vice President for Government Affairs, at (202) 682-4837.